WONG KEE CHONG
(AN INFIRM SUING THROUGH HIS
WIFE AND NEXT FRIEND, CHAU NYOK YEN)

v.

WONG KOW & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASMAT NIK MOHAMAD JC
[CIVIL SUIT NO: S6-22-476-2003]
26 SEPTEMBER 2012

CONTRACT: *Void contract - Capacity - Execution of memorandum of transfer of share in two properties - Plaintiff suffering from chronic mental illness preceding execution of transfer - Agreement executed by person of unsound mind - Whether void - Whether plaintiff lacked mental capacity to understand consequences of execution of transfer forms - Fraud - Whether defendants committed fraud against plaintiff in execution of plaintiff's transfer - Undue influence - Whether first defendant in advantageous position to influence and dominate plaintiff*

CIVIL PROCEDURE: *Parties - Action - Action instituted by plaintiff's wife as plaintiff's next friend - Whether plaintiff's wife proper party to institute present action on behalf of plaintiff - Rules of the High Court 1980, O. 76 r. 3(2)*

EVIDENCE: *Expert Evidence - Mental incompetency - Plaintiff's mental incompetency to execute transfer of properties primarily premised on testimony of medical expert - Whether plaintiff's expert evidence confirmed plaintiff's mental incompetency - Whether defendants' expert evidence casted doubt on plaintiff's case*

Wong Kow @ Wong Kee Fong ('the first defendant') and his younger brother Wong Kee Chong ('the plaintiff') became the joint registered owners of two pieces of land situated in Serdang, Selangor ('the two properties') upon the demise of their late mother. In 1994, the plaintiff had transferred his half share in the two properties to the first defendant and the first defendant's three sons (the second, third and fourth defendants). The transfer of the plaintiff's share in the two properties, which was effected by way of two memorandums of transfer (the transfer) executed by the plaintiff on 27 May and 3 June 1994, resulted in a substantial dilution of the plaintiff's interest in the two properties. The plaintiff's wife and children claimed that the defendants had fraudulently transferred the plaintiff's interest in the two properties to themselves. Due to the mental state of the plaintiff, the present

A action was instituted by the plaintiff's wife as the plaintiff's next friend. It was the plaintiff's case that he had been suffering from chronic mental illness over a considerable period of time preceding the execution of the transfer of the properties to the defendants. As such, the plaintiff contended that pursuant to ss. 11 and 12
B of the Contracts Act 1950 ('the Act'), he was mentally incompetent to execute the transfer of the two properties to the defendants. The plaintiff thus prayed (i) for the transfer of the two properties to be declared null and void; (ii) for his name to be reinstated in the Register of the Petaling Land Office as the half
C share owner of each of the two properties; and (iii) for general damages, interests and costs. The defendants contended that the plaintiff was mentally competent to execute the transfer of his shares in the two properties and denied the plaintiff's allegation of fraud. The defendants also disputed the competency of the
D plaintiff's suit on the grounds that in the absence of a determination that the plaintiff was suffering from mental illness, the plaintiff's wife was not the proper party to institute the present action on the plaintiff's behalf.

E **Held (allowing claim with costs):**

(1) As the plaintiff had alleged mental incompetency and the defendants' fraud in inducing him to execute the transfer of his interest in the two properties, the onus was on him to
F prove that at the time of the transfer of the two properties, he was mentally unsound and thus lacked the mental capability to understand and form a rational judgment on what he had contracted. (para 13)

(2) Based on s. 11 of the Act, a mentally unsound person was
G clearly prohibited from contracting and that any agreement executed by a person of unsound mind was void. In this regard, although there was no conclusive medical evidence of the plaintiff's medical capability to understand the disputed transfer, it was clear from the evidence of the witnesses and
H the plaintiff's medical reports that he had a long history of severe and chronic mental illness. As the plaintiff's mental illness dated back to the early 1980s, and as the defendants were fully aware of the plaintiff's mental disability, it was concluded that at the time of the transfer, the plaintiff was
I mentally incompetent and lacked the mental capacity to understand the nature of the transfer transaction and its consequences on his interest. (paras 22 & 38)

(3) The finding of the plaintiff's mental incompetency to execute the transfer of the two properties was primarily premised on the testimony of the medical expert ('PW2'), a senior consultant psychiatrist, who had confirmed in court that as of the plaintiff's last visit to the hospital on 16 August 2011, he was still suffering from chronic schizophrenia. PW2's medical report also stated that the plaintiff had been suffering from chronic schizophrenia since 1984. Under cross-examination, PW2 had also confirmed that given the severity of the plaintiff's mental illness, he was incompetent to give consent or make any rational decision on legal or medical matters. (paras 23, 24 & 26)

(3a) Although the defendant's medical witness ('DW6') testified that during periods of lucidity the plaintiff would be able to execute legal documents, she agreed that she was not competent to determine the plaintiff's medical capacity to execute the transfer of the two properties. Further, DW6's testimony of the plaintiff's medical condition was clearly based on her opinion on the medical reports of the plaintiff and not on her personal examination of the plaintiff. On the contrary, it was clear that PW2's expert evidence was made in PW2's capacity as a consultant psychiatrist of the country's premier hospital and based on his personal examination of the plaintiff. (paras 29 & 32)

(4) Further evidence of the plaintiff's history of chronic mental illness was adduced from the plaintiff's wife, his daughter and the tenant who lived in the plaintiff's premises since 1980. The tenant was found to be an independent, truthful and reliable witness and his testimony on the plaintiff's mental illness was consistent with the evidence adduced. (paras 33-37)

(5) The first defendant as the plaintiff's elder brother would presumably be in an advantageous position to influence and dominate over a much younger sibling whose medical impediment rendered him susceptible to undue influence. Thus, on a balance of probabilities, the plaintiff had succeeded in proving that he lacked the mental capacity to understand the consequences of the execution of the transfer forms. The plaintiff's transfer of the two properties was accordingly invalid and ineffective against the plaintiff. (paras 39 & 40)

(6) The first defendant was the main person responsible for the plaintiff's transfer of the two properties, thus he would clearly be a material witness to determine whether the defendants had defrauded the plaintiff into transferring the plaintiff's interests in the two properties to the defendants. The first defendant's failure to attend court to rebut the plaintiff's claim would therefore render the latter's assertion as to fraud to remain unchallenged. It would also allow the presumption of adverse inference under s. 114(g) of the Evidence Act 1950 to be invoked against the first defendant. In light of the plaintiff's long history of chronic mental illness, the peculiar circumstances surrounding and in the absence of the first defendant's evidence to challenge the plaintiff's assertion, it was concluded that the defendants had defrauded the plaintiff into transferring his interest in the two properties to the defendants. (paras 49-51 & 54-57)

(7) The Mental Disorders Ordinance 1952 did not contain any provision requiring the plaintiff to be first determined a mentally disordered person prior to the institution of a court action by his next friend. Based on the clear exception provided in O. 76 r. 3(2) of the RHC 1980, it was clear that there was no requirement for a court order before the plaintiff's wife was to be allowed to act on the plaintiff's behalf as his next friend. Accordingly, the defendants' objection to the competency of the plaintiff's suit was clearly misconceived and without merit. (paras 59-65)

Case(s) referred to:

Chemsource (M) Sdn Bhd v. Udanis Mohammad Nor [2001] 6 CLJ 79 HC ***(refd)***

Chong Soon v. Uma Devi V Kandiah [2011] 3 CLJ 1 CA ***(refd)***

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Imperial Loan Co v. Stone [1892] 1 QB 599 ***(refd)***

Lai Kwee Lan & Anor v. Ng Yew Lay & Anor [1989] 1 LNS 111 HC ***(refd)***

Manches v. Trimbon [1946] 115 LJ KB 305 ***(refd)***

PP v. Mohamed Kassim Yatim [1976] 1 LNS 105 ***(refd)***

Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 10, 11, 12(1)

Evidence Act 1950, s. 114(g)

Mental Disorders Ordinance 1952, ss. 2, 3, 10

Rules of the High Court 1980, O. 76 rr. 1, 2(1), 3(2), 3(7)(c)

For the plaintiff - Suria Kumar; M/s Suria Kumar & Co A
For the defendants - S G Gan (Noraliza & Kanaga with her); M/s Yong & Rakan-Rakan

Reported by Vani Krishnan

B

JUDGMENT

Nik Hasmat Nik Mohamad JC:

Factual Background C

[1] The plaintiff instituted this action through his wife against the plaintiff's elder brother, the 1st defendant and the 1st defendant's sons, 2nd defendant, 3rd defendant and the 4th defendant for the return of his share in two pieces of land held D
under HSD 115832, PT No. 2664, and HSD 114968, PT No. 2665 in the District of Petaling, Serdang Selangor ('the properties'). The plaintiff and the 1st defendant were up to 1994 the joint registered owners of both properties which had been inherited upon the demise of their late mother in 1982. E

[2] The plaintiff claimed that the defendants had fraudulently transferred the plaintiff's interest in both the properties to the defendants. At the material time of the transfer, the plaintiff was said to be suffering from mental illness and was mentally F
incompetent to execute the transfer. The defendants were alleged to have deceived the plaintiff into transferring 1/2 of the plaintiff's share in the 1st property to the 1st, 2nd, 3rd and 4th defendants by way of a memorandum of transfer dated 27 May 1994 and further deceived the plaintiff by transferring the plaintiff's 1/2 share G
in the 2nd property to the 3rd and to the 4th defendants by another memorandum of transfer dated 3 June 1994 ("the transfer"). The fraudulent transfer resulted in a substantial dilution of the plaintiff's interests from 1/2 share in each of the property to 1/5 share in the first property and 1/6 in the second property. H

[3] The plaintiff is claiming for the return of his shares in both properties and among the other prayers, seek for the memorandum of transfer dated 27 May and 3 June 1994 to be set aside and for a declaration that the transfer of the plaintiff's share in both I
properties by way of the aforesaid memorandum invalid, null and void. The plaintiff further seeks a court order for the registrar or the Land Administrator to be ordered to replace the names of

A 1st defendant, 2nd defendant, 3rd defendant and the 4th defendant with that of the plaintiff and the plaintiff's 1/2 share in both the 1st property and the 2nd property, be restored.

The Plaintiff's Claim

B **[4]** Pursuant to para. 9 of the plaintiff's statement of claim, the plaintiff sought the following reliefs against the defendants:

(a) A declaration that the transfer the of plaintiff's 1/2 share *vide* memorandum of transfer dated 27 May 1994 from the plaintiff
C to the 1st, 2nd, 3rd and 4th defendants in the first property and, *vide* memorandum of transfer dated 3 June 1994 the plaintiff's transfer of 1/2 share to the 2nd defendant, 3rd defendant and 4th defendant in the second property respectively exhibited in P12 and P13, as null and void and
D for the aforesaid memorandum be set aside.

(b) For the Registrar/Land Administrator of the Petaling Land Office be ordered to delete the names of the 1st to 4th defendants as registered owners of the respective
E properties and, to reinstate the plaintiff's name as the 1/2 share owner of each of the property.

(c) Assessment of general damages, interests and costs, and

(d) Other relief deem fit and proper to be ordered by the court.

F

Issues

(a) Whether the plaintiff was of unsound mind at the material time of the execution of the plaintiff's transfer of shares to the
G defendants, and

(b) Whether the defendants defrauded the plaintiff in the execution of the transfer of plaintiff's share which, respectively had reduced the plaintiff's 1/2 share to 1/5 and 1/6 share in each of the property.

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Court Judgment

[5] Based on the oral testimonies of witnesses and documentary evidence adduced before the court and having considered and
I evaluated the evidence in its entirety, the plaintiff have succeeded to prove that the plaintiff had been defrauded by the defendants into transferring the plaintiff's shares to the defendants, at a time when the plaintiff was mentally unsound and was incompetent to

execute the transfer. The transfer had been executed in the presence of the defendants who in the light of parties' consanguineous relationship knew that the plaintiff by reason of his mental illness was mentally incapacitated from understanding the nature and the consequences of the transfer on his interest.

The Plaintiff's Case

[6] The plaintiff had sought the return of his share in both properties which had been fraudulently transferred to the defendants. At the time of the transfer, the plaintiff had been suffering from chronic mental illness over a considerable period preceding the transfer and was thus incompetent to execute the transfer pursuant to ss. 11 and 12 of the Contracts Act 1950 ("the Act").

The Defendants' Case

[7] The defendants contended that the plaintiff was mentally competent to execute the transfer of the plaintiff's shares in both properties to the defendants and the plaintiff's transfer was thus effective and valid.

[8] The defendants denied the plaintiff's allegation of fraud. The defendants contended that the plaintiff had readily, voluntarily and on his own accord, transferred the plaintiff's shares to the defendants in consideration of love and affection as the defendants had been providing and caring for the plaintiff in the absence of the plaintiff's wife and children.

[9] The defendants further disputed the competency of the plaintiff's suit on the ground that the plaintiff's wife had no *locus* and was not the proper party to institute the court proceeding on the plaintiff's behalf to object to the transfer. The defendants contended that the plaintiff was first required to be determined as a mentally disordered person pursuant to the Mental Disorders Ordinance 1952 ("the Ordinance"), prior to the commencement of the court proceeding by the plaintiff's next friend, the plaintiff's wife.

[10] Further, pursuant to O. 76 r. 2 of the Rules of the High Court 1980, ("the Rules") a court order was required before the plaintiff as a person under disability was allowed to act by his next friend. Thus in the absence of a determination that the plaintiff was suffering from mental illness, the plaintiff's wife was not

competent to institute court action on the plaintiff's behalf and could not rely on the exception provided under O. 76 r. 3(2) of the Rules.

[11] The defendants further denied the plaintiff's allegation that the defendants had defrauded the plaintiff in the transfer. The defendants had claimed that following the death of the plaintiff and the 1st defendant's mother in 1981, there existed an oral agreement between the plaintiff and the 1st defendant for the properties be transferred to the 1st defendant. The defendants claimed that the oral agreement had been witnessed by family members and that the plaintiff's wife was aware of the understanding.

Grounds Of Judgment

Whether The Plaintiff Was Of Unsound Mind At The Material Time Of The Execution Of The Transfer

[12] The plaintiff had claimed that at the time of the transfer the plaintiff was of unsound mind and thus, could not understand the significance of the transfer. In this regard, the issue as to whether the plaintiff was indeed mentally unsound at the time of contracting and whether the plaintiff's mental illness had affected the plaintiff's mental capacity to execute the transfer can only be decided and adjudicated upon evidence adduced in a full trial. The plaintiff alleged mental incompetency and the defendants' fraud in inducing the plaintiff into the transfer.

[13] The onus was therefore on the plaintiff to prove that at the time of the transfer, the plaintiff was mentally unsound and thus lacked the mental capability to understand and form a rational judgment on what he had contracted. The general rule, of course is that he who asserts must prove. The plaintiff is thus required to produce witnesses and adduce evidence in a full trial to prove that the plaintiff was indeed mentally incompetent to transact the transfer at the time of transfer. In this regard, the High Court on 25 June 2009 allowed the plaintiff's appeal against the decision of the Senior Assistant Registrar allowing defendants' interlocutory application to strike out the plaintiff's suit. Justice TS Nathan in his ground of judgment held:

> (f) Medical evidence will have to be forthcoming at the trial as to the mental condition of the Plaintiff at the material time, having regard to the medical reports already exhibited.

[14] At the time this suit was filed in 2003, the plaintiff have not been found by due cause of law to be a mentally disordered person. The defendants thus contended that at the material time of the transfer the plaintiff was of sound mind and was thus competent to execute the transfer of his share of the property to the defendants.

[15] In this regard, based on s. 10 of the Act, all agreements are contracts if they are made with the consent of parties who are competent to contract for a lawful consideration and with a lawful object. Pursuant to s. 11 of the Act, a person of unsound mind was incompetent to contract and any contract by a person of unsound mind is void and not merely voidable. Sections 10, 11 and s. 12 of the Act provides:

Section 10. What Agreements Are Contracts

(a) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

(b) Nothing herein contained shall affect any law by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Section 11. Who Are Competent To Contract

Every person is competent to contract, who is of age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

[16] Section 12(1) of the Act proceeds to define "sound mind" for the purpose of contracting. Section 12 provides as follows:

Section 12. What Is A Sound Mind For The Purpose Of Contracting

(a) A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests.

(b) A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A (c) A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

[17] It was clear from the provision of s. 12, that the plaintiff
B who by reason of his long history of mental illness would usually be of unsound mind could be regarded as of sound mind and competent to contract if at the time of the transfer, he was proven to be capable of understanding and forming a rational judgement on the effect of the transfer on his interest.

C **[18]** The court was required to determine the issue as to whether the plaintiff have successfully proven the plaintiff's mental incompetency at the time of contract which render the plaintiff's transfer invalid and ineffective. In determining the plaintiff's mental
D capability to understand the transfer transaction that he had executed, the court considered and evaluated oral evidence of witnesses on the plaintiff's mental condition as against the contemporaneous documents on his condition, namely the medical reports of the plaintiff. Of utmost and paramount consideration to
E the court would be to determine as to whether the plaintiff was suffering from such a degree of mental disability that the plaintiff was mentally incapacitated and prevented from understanding the significance of his transfer. In the case of *Chemsource (M) Sdn Bhd v. Udanis bin Mohammad Nor* [2001] 6 CLJ 79; [2002] 6 MLJ
F 273, Abdul Malik Ishak J cited with approval the English case of *Manches v. Trimbon* [1946] 115 LJ KB 305 which decided that one must look at the nature of the transaction in ascertaining whether the party who alleges insanity really understood and was competent to enter a transaction. The finding would be dependent
G on the facts of each case as no court could readily prescribe a prefix standard of sanity to apply for all transactions. The issue as to whether the plaintiff was indeed insane at the time of contracting and whether the plaintiff can be categorised as a "mentally disordered person" within the meaning of s. 2 of the
H Ordinance can only be ascertained and determined by way of a full trial.

[19] In deliberating the issue as to whether, the plaintiff was capable of understanding the significance and consequences of his transfer at the time of its execution, the court deliberated on the
I evidence of witnesses who were present during the plaintiff's execution of the transfer, who had accompanied the plaintiff to

the solicitor's office and were present during the transfer namely DW2, DW4 and DW5. DW4 and DW5 had confirmed in court that during the transfer the plaintiff appeared normal and the plaintiff had agreed and understood the transfer transaction. It was further confirmed that the transfer was executed after the necessary explanation was made to parties present, including the plaintiff by the attending solicitor.

[20] The attending solicitor, DW2, who witnessed the plaintiff's execution of the transfer documents, had further confirmed in court that at the time of transfer, the plaintiff was lucid, had appeared normal and understood the effect of the transfer on his interest. DW2 however, conceded that he had no knowledge of the plaintiff's mental illness as he had not met the plaintiff prior to the execution of the transfer. In this regard, the defendants' medical witness, DW6 had also confirmed that a patient who was diagnosed as chronic schizophrenic in 1998 may be competent to execute legal document and distribute his asset as competency and capacity to contract cannot be based on mere diagnosis. The plaintiff who was stated in medical report in exh. P2 as "he no longer suffer from psychosis" was confirmed by DW6 to be in some form of remission at the time of the hospital visit on 8 July 1999 and could have been in a state of remission at the time of the transfer. DW6 had however, agreed that "relapses" are likely in schizophrenia as it is a life long illness.

[21] The defendants thus contended that even if the court accepted that the plaintiff had been suffering from mental illness for a period exceeding 20 years, no evidence had been adduced in court that conclusively proved that the plaintiff was mentally incapacitated from executing the transfer. In view of the clear testimony from the defendant's witnesses as to the plaintiff's "mental competency" to execute the transfer, the defendants thus submitted that the plaintiff in accordance with ss. 11 and 12 of the Act was competent to contract and the plaintiff's transfer was for all intents and purposes, valid and enforceable. The defendant cited the English case of *Imperial Loan Co v. Stone* [1892] 1 QB 599 to support the defendant's contention that a contract entered into by a person of unsound mind, is voidable at his option. A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at

A the time he made the contract that the person with whom he was dealing was of sound mind. In the said case, Lord Esher MR had held at p. 601:

> When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what it was about.

[22] Given the defendants' contention, it was however clear that based on the provision of s. 11 of the Act a mentally, unsound person was clearly prohibited from contracting and that any agreement executed by a person of unsound mind was void. In this regard, although there was no conclusive medical evidence on the plaintiff's mental capability to understand the disputed transfer, it was however clear from the evidence of witnesses and the conclusive medical reports of the plaintiff exhibited in P2, P3 and P4 that the plaintiff had a long history of severe and chronic mental illness. The plaintiff's mental illness dated back to the early 1980's and the defendants were fully aware of the plaintiff's mental disability. The court therefore concluded that at the time of the transfer the plaintiff was mentally incompetent and lacked the mental capacity to understand the nature of the transfer transaction and its consequences on his interest.

[23] The court's finding of the plaintiff's mental incompetency to execute the transfer was primarily premised on the testimony of a medical expert and medical reports of PW2, a senior consultant psychiatrist from Psychology Unit of the University Malaya Medical Centre who had confirmed in court that as of the plaintiff's last visit to the hospital on 16 August 2011, the plaintiff was still suffering from chronic schizophrenia. In the case of *PP v. Mohamed Kassim Yatim* [1976] 1 LNS 105; [1977] 1 MLJ, Hashim Yeop Sani J, held at p. 67:

> Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. It has always been accepted that expert evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence would be to see whether the court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

[24] PW2's medical report in P3 dated 18 March 2004, had stated that the plaintiff had since 1984, been suffering from chronic schizophrenia for a period exceeding 20 years. PW2 confirmed the plaintiff had sought treatment from the hospital for his mental condition. According to PW2, the plaintiff was first treated at the hospital for his mental condition on 11 April 1998 and was last seen by PW2 on 16 August 2011 after the plaintiff's previous visit to the hospital on 29 June 2011.

[25] PW2's medical report in exh. P4 stated that the plaintiff was treated with 40mg of IM Fluanxol, 100mg Chlorpromazine and 1mg Benzhexol. According to PW2, the average dosage of prescription prescribed for a mental patient was 20mg of IM Fluanxol. PW2 had confirmed that the plaintiff was required to be on continuous medication to prevent a relapse and that due to the severity of his mental illness, the plaintiff had also been treated with an injection of 40mg Im Fluanxol beginning from 25 July 1998.

[26] Under cross-examination by the defence counsel, PW2 had confirmed that on 2 October 2000, the plaintiff who was accompanied by the plaintiff's wife was severely mentally ill and had to be prescribed immediate medication by injection. PW2 further confirmed that the plaintiff's mental illness was of the most severe stage of mental illness, namely chronic schizophrenia. The plaintiff was confirmed to fall within the category of two third of chronic schizophrenic patient who would not recover from his mental illness and would not be able to function as a normal person, and given the severity of the plaintiff's mental illness, the plaintiff was incompetent to give consent or make any rational decision on legal or medical matters. Therefore, it was clear from PW2's medical testimony that the plaintiff was mentally incompetent to handle the execution of elaborate legal documents which undisputedly would pose serious implication beyond the plaintiff's mental comprehension.

[27] PW2 had stated that the plaintiff could not function normally, have poor insight of his mental condition and had refused to take oral medication for his condition. The plaintiff constantly defaulted on his follow up medical appointment and hospital visits and was thus not seen in the hospital's regular E clinic but in D clinic, designated for patient who defaulted on medication and follow up treatments. During the plaintiff's last visit

A to the hospital, PW2 was informed by the plaintiff's wife that the plaintiff had been admitted to Serdang Hospital for overdosing on his medication.

[28] The defendants objected to the medical report of PW2 and
B contended that PW2 have no personal knowledge of the plaintiff's mental illness as PW2 was not the doctor who in 1998 had first diagnosed the plaintiff to be suffering from mental illness. The defendants further objected to PW2's reliance on the case notes of medical officers in the preparation of PW2's medical reports and
C thus disputed the admissibility of PW2's testimony and medical reports in P2, P3 and P4 on the ground of hearsay.

[29] The defendant's medical witness, DW6 had testified that a medical officer could not determine with medical certainty whether a mental patient lacked the mental capacity to execute
D legal documents and distribute his asset. DW6 stated that the plaintiff's mental symptom such as delusion and hallucination was periodical and that the plaintiff had period of lucidity, he would be able to execute legal documents. DW6 however agreed that she was not competent to determine the plaintiff's mental capacity
E to execute the transfer. In this regard, DW6's testimony of the plaintiff's mental condition was clearly based on her opinion on the medical reports of the plaintiff and was not based on her personal examination of the plaintiff as the plaintiff was not DW6's patient.

F **[30]** On the contrary, PW2's evidence on the plaintiff's mental condition was reliably based on PW2's personal examination on the plaintiff's case notes and medical records of the hospital's medical officers. The case notes and medical records of the attending medical officers of the hospital were based on the
G doctors' personal examination on the plaintiff beginning from the time the plaintiff was first diagnosed by the hospital in 1998, up to the plaintiff's last visit on 29 June 2011. The first diagnosis of the plaintiff was based on the hospital's medical officer's personal examination on the plaintiff and the plaintiff's own information that
H he had suffered from mental illness since 1984. PW2 further confirmed that although the medical records of the plaintiff were not produced in court, such records were as a matter of practice stored in the hospital's microfilm.

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[31] In this regard, it was clear that PW2's expert evidence was made in PW2's capacity as a consultant psychiatrist of the country's premier hospital and was based on PW2's personal examination on the plaintiff. PW2 had confirmed that the plaintiff received treatment for his mental condition in a series of appointment at the hospital on 19 April 1998, 20 March 2000, 12 June 2000, 10 July 2000, 2 October 2000, 23 March 2010, 10 May 2011 and 16 August 2011. Based on PW2's latest medical report of the plaintiff exhibited in P4 and PW2's personal examination of the plaintiff, PW2 confirmed that the plaintiff had been suffering from the most severe stage of mental illness, chronic schizophrenia for the period between 2010 to 2011 and had been continuously treated with the maximum dosage of medication prescribed for mental patient in Malaysia namely the 40mg IM Fluenxol.

[32] The plaintiff's history of chronic mental illness was further corroborated by the evidence of PW1, the neighbourhood general medical practitioner whose general practice was located a few doors from the plaintiff's premise. PW1 confirmed that the plaintiff have been suffering from "longstanding psychosis not on treatment" which exceeded 20 years. PW1 confirmed that the plaintiff had been treated by PW1 and was confirmed to be suffering from psychotic condition since the 1980's.

[33] Further evidence of the plaintiff's history of chronic mental illness were adduced from family members, the plaintiff's wife, PW5 and the plaintiff's daughter, PW3. According to PW5, the plaintiff's mental illness started as early as 1981 which drove PW5 to leave the plaintiff with their four young daughters in 1983. PW5 confirmed that as at the date of the transfer in 1994, the plaintiff was still suffering from mental illness. PW5 further confirmed that during the period between 1994 to 1997, PW5 had brought the plaintiff to the University Hospital for the plaintiff's treatment and that the plaintiff had constantly defaulted on his medication and medical appointment. PW5 thus confirmed that by reason of plaintiff's mental illness the plaintiff would not be able to understand the transfer transaction that had been executed in the absence of the plaintiff's family members. The plaintiff's daughter, PW3 had further confirmed that due to the plaintiff's mental illness her mother left the plaintiff in 1983 at the family home and that the plaintiff had not been brought to the hospital for treatment for his mental condition due to the family's poverty.

[34] Further corroborative testimony of the plaintiff's long history of mental illness came from PW4, the tenant of plaintiff's premise. PW4 had been renting from the plaintiff the front portion of the plaintiff's premise since 1980. PW4 clearly possess personal knowledge of the plaintiff's mental condition as prior to his tenancy, PW4's younger brother Leong Teik Chin had been renting the same premise from the plaintiff's mother. PW4 confirmed that the plaintiff suffered from mental illness since 1980's and that at the time of the disputed transfer the plaintiff was still suffering from mental illness.

[35] PW4 had further confirmed that the plaintiff would not be capable of understanding the consequence of his land transfer to the defendants. PW4 also corroborated PW3 and PW5's testimony that as a result of the plaintiff's violence from the plaintiff's mental illness PW5 had left the plaintiff with their four young daughters in 1983. PW4's testimony was consistent with PW2's testimony that the plaintiff suffered from mental illness since 1984, PW5's testimony that the plaintiff's mental illness started in 1981 and the medical reports tendered by PW2 as in P2, P3 and P4.

[36] PW4 had also confirmed in court that due to the plaintiff's mental illness, PW4 had been dealing with the plaintiffs wife, PW5 on the tenancy of the plaintiff's premise. PW4 stated that on the plaintiff's wife's instruction, he had paid his monthly rental to PW5 after deducting the plaintiff's living expenses. According to PW4, he had occasionally attended to the plaintiff's needs which included bringing the plaintiff to the hospital for his medical appointment. PW4 confirmed that the plaintiff was frequently not working during PW4's period of tenancy. PW4 confirmed about the plaintiff's unkempt general appearance, that the plaintiff walked around aimlessly, talked to himself and on one occasion PW4 had witnessed the plaintiff swimming in a sewerage pond.

[37] The defendants had however disputed PW4's evidence as self serving and misleading but other than paying rental to the plaintiff's wife PW4 was not found to have any personal interest and would not benefit from the outcome of the plaintiff's suit. PW4's testimony of the plaintiff's mental illness was clearly based on PW4's proximity and personal relationship with the plaintiff during his long period of tenancy. PW4 was found to be an

independent, truthful and reliable witness and that PW4's testimony on the plaintiff's mental illness were undisputedly consistent with the evidence adduced before the court. A

[38] Therefore, although the court conceded that there was no conclusive medical evidence on the plaintiff's mental condition at the time of transfer in the light of undisputed and overwhelming evidence of the plaintiff's mental illness the court found the plaintiff to be mentally incompetent to execute the contract. In view of the plaintiff's undisputed history of chronic mental illness over the period preceding and pursuant to the transfer it was highly probable that plaintiff was mentally incapable of understanding the transfer and was accordingly incompetent to execute the transaction. The court concluded that when the plaintiff was brought to the lawyer's office by the 1st defendant and the 1st defendant's children, 2nd defendant, 3rd defendant and 4th defendant for the execution of the transfer documents, the plaintiff would have lacked the mental ability and capacity to make a rational judgment and in all probability was under the undue influence of the defendants to execute the transfer. B C D

[39] Further, it was noted that as the 1st defendant was the elder brother of the plaintiff with a considerable gap between their ages and as the plaintiff had effectively lived alone for a considerable part of his life, the 1st defendant would be in a position of considerable dominance and influence over his younger sibling. In the case of *Lai Kwee Lan & Anor v. Ng Yew Lay & Anor* [1989] 1 LNS 111; [1990] 1 MLJ 211, Justice Chan Sek Keong at p. 216 stated: E F

> The general rule, of course, is that he who asserts must prove. However, section 113 of the Evidence Act reverses this burden where one party is in a position of active confidence to the other. There are certain personal relationship which equity regards as giving rise to the presumption of undue influence because one party is deemed to be in a position of dominance vis-à-vis the other, parent and child, trustee and beneficiary, doctor and patient. G H

[40] The plaintiff save for the occasional visits by the plaintiff's family had practically and effectively lived alone since 1983 in a family house adjoining the defendants. The 1st defendant as the plaintiff's elder brother would presumably be in an advantageous position to influence and dominate over a I

much younger sibling whose mental impediment rendered him highly susceptible to external and undue influence. Thus, on a balance of probabilities the plaintiff had succeeded to prove that at the time of the plaintiff's execution of the transfer forms, the plaintiff lacked the mental capacity to understand the consequences of the transaction and plaintiff's transfer was accordingly invalid and ineffective against the plaintiff.

Whether The Defendants Committed Fraud Against The Plaintiff In The Execution Of The Plaintiff's Transfer

[41] The plaintiff's claim was for the return of the plaintiff's share in both properties which have been fraudulently transferred to the defendants. The plaintiff had alleged that the defendants deceived the plaintiff into the transfer at a time when the plaintiff was suffering from chronic mental illness. The defendants had strenuously contended that the main issue for the court's determination was not the plaintiff's competency to execute the transfer but the plaintiff's allegation of the defendants' fraud against the plaintiff *vide* the transfer documents in exhs. P12, P13, D14 and D15.

[42] As fraud in civil cases must be proven beyond reasonable doubt the onus was on the plaintiff to prove the defendants' fraud to the required standard. However, upon consideration of the parties contention in respect of the matter, it was clear that in essence the issue to be determined by the court was not the issue of defendants' fraud but the issue of the plaintiff's competency to execute the transfer. Accordingly, the applicable standard for the plaintiff to prove was on a balance of probabilities and not beyond reasonable doubt as was contended by the defendants.

[43] In this regard, it was further contended by the defendants that if the defendants had indeed intended to defraud the plaintiff, the defendants would have transferred the plaintiff's entire share in both properties to the defendants and the plaintiff would not be allowed to retain it's 1/5 and 1/6 share in both properties. The defendants alluded to the purported fraud committed by the plaintiff's family in their sale and disposal of the plaintiff's entire share in the rubber estate which had been effected at a time when the plaintiff was suffering from mental illness. The defendants thus submitted that the plaintiff's claim should fail as the plaintiff have

failed to prove the allegation of fraud beyond reasonable doubt as was held by the Court of Appeal in the case of *Chong Soon v. Uma Devi V Kandiah* [2011] 3 CLJ 1; [2011] 2 MLJ 591 which held:

> It is trite law that has been held and upheld by the apex courts in this country that the standard of proof for fraud, in civil cases, is beyond reasonable doubt and that the trial judge in that case had erred when applying the standard of proof as on a balance of probabilities.

[44] In the case of *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121, the Federal Court which held that in fraud cases the burden of proof must be proved beyond reasonable doubt was upheld by the Privy Council. In the case of *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34, the Supreme Court held:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion or conjecture. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt.

[45] In determining the issue as to whether the plaintiff was defrauded by the defendants' in his transfer, the court deliberated the testimonies of witnesses on the circumstances alluding and surrounding the transfer. In this regard, DW4 and DW5 who are the plaintiff's nephews gave evidence that the plaintiff had voluntarily transferred his share of the properties to the defendants and had signed all the required documents before a lawyer. The lawyer, DW2 had confirmed in court that the plaintiff was present at his office and that the plaintiff who had appeared normal had agreed and understood the consequence of his transfer.

[46] DW4 further gave testimony that on 21 July 1981, a week after the funeral of his grandmother, an understanding was reached in the presence of elderly family members including the plaintiff for the rubber estate to be given to the plaintiff and the properties located at No 1510, Jalan Besar, Seri Kembangan was

to be given to 1st defendant. DW4 further testified, that for the period between 1994 to 1998, as the plaintiff's family rarely visited the plaintiff, they were not informed of the plaintiff's transfer to the defendants. DW4 however confirmed that for the period between 1997 to 1998, the plaintiff was occasionally brought by the plaintiff's family to live with them and subsequently the plaintiff's family visited the plaintiff more frequently.

[47] It was clear that the disputed transfer had been executed in the absence of the plaintiff's family on the 1st defendant's instruction at the 1st defendant's lawyer's office. The 1st defendant was however not present in court to give evidence. Based on the medical report of the 1st defendant which had been prepared by DW6, as exhibited in D23, the 1st defendant who is 82 years old was stated to be suffering from mild Alzheimer. According to DW6, the 1st defendant was unable to give evidence in court due to "diminished capacity (to give evidence) and memory decline of short term memory".

[48] In this regard the onus was clearly on the defendants to disprove the plaintiff's assertion that the plaintiff was defrauded by the defendants in his transfer. The court was accordingly entitled to the best evidence before it can be called upon for a decision and the 1st defendant, if produced would be the best evidence to disprove the plaintiff's claim of incompetency to the transfer and the plaintiff's allegation of the defendants' fraud in the transfer. It is trite that generally, if a party failed to call a material witness it is almost inevitable that his claim would be rejected.

[49] The 1st defendant therefore would have been the best person to give evidence on the circumstances preceding and surrounding the transfer which caused his brother, a mental patient to transact the transfer to the 1st defendant and 1st defendant's children in his family's absence. PW5 had testified that prior to the transfer the 1st defendant had attempted to persuade her into transferring the plaintiff's rubber estate to the 1st defendant. PW5 confirmed that the decision to sell the plaintiff's rubber estate was due to harassment by the 1st defendant. The solicitor who attended to the transfer, DW2, had confirmed in court that at the time of the transfer the plaintiff was accompanied by the 1st defendant and the 1st defendant's children, 2nd defendant, 3rd defendant and 4th defendant.

According to DW2, he had been instructed by the 1st defendant who had given clear instruction for him to prepare the transfer documents to transfer the plaintiff's share in both properties to the defendants and execute the transfer documentation. DW2 confirmed that he had no prior knowledge of the plaintiff's mental condition, DW2 further confirmed that although both documents were differently dated, the transfer was simultaneously executed on the same date ie, 27 May 1994. Given the clear involvement and the dominant role of the 1st defendant in the events alluding and surrounding the transfer, the 1st defendant's attendance in court to rebut the plaintiff's unchallenged evidence of the 1st defendant's involvement in the disputed transfer was undoubtedly absolutely vital.

[50] Based on the overwhelming evidence of the 1st defendant's involvement in the transfer, it was clear that the 1st defendant would clearly be a material and vital witness for the court to determine the defendants' fraud in the transfer. The 1st defendant had been proven to be responsible for arranging the plaintiff to his solicitor's office to execute the transfer which had been confirmed by the 1st defendant's sons, DW4 and DW5. In their testimony in court both DW4 and DW5 were found by the court to be vague and dismissive where both DW4 and DW5 denied any involvement of fraud in the transfer. As both DW4 and DW5 were interested parties and had clearly benefited from the plaintiff's transfer, the court considered and deliberated on their testimony and concluded their evidences were of insignificant probative value.

[51] As it was clear that the 1st defendant was the main person responsible for the plaintiff's transfer, the 1st defendant's attendance in court was vital to challenge the plaintiff's case against him. In this regard, despite the testimony of DW6 in support of the 1st defendant's inability to attend court proceeding, the court noted that despite his medical condition the 1st defendant had not sought medical treatment from any hospital for his condition. The 1st defendant's failure to attend court to rebut the plaintiff's claim rendered the plaintiff's assertion clearly unchallenged and allowed the presumption of adverse inference under s. 114(g) of the Evidence Act 1950 to be invoked against the 1st defendant. The court was therefore entitled to presume

A that if the 1st defendant was produced, his testimony would have been unfavourable to the defendants. Section 114(g) of the Act provides:

> 114. Court may presume existence of certain fact.
>
> B The court may presume the existence of any fact which it thinks is likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> C Illustration
>
> The Court may presume:
>
> (g) That evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

D **[52]** Further evidence was evident in the police report of the plaintiff's daughter, PW3 exhibited in P7. According to PW3, the plaintiff's signature in the transfer forms exhibited in P12, P13, D14 and D15 were found to be markedly different from the probate documents of the plaintiff as in exh. P19 and P21 which E was consistent with the plaintiff's allegation of the defendants fraud in the transfer. DW2, the solicitor who had attended to the probate matter was vague and evasive when questioned on the delay of 11 years in the extraction of the plaintiff's probate documentation.

F

[53] PW3 had stated in court that due to the plaintiff's mental illness, the sale transaction of the plaintiff's rubber estate was witnessed by the plaintiff's family members. The plaintiff had been accompanied by the plaintiff's family as her father could not G understand the transaction and had merely scribbled his signature on the documents. PW3's testimony was corroborated by the solicitor who conducted the said sale transaction, DW1 who confirmed that during the execution of the sale documentation at DW1's office, the plaintiff had always been accompanied by his H wife and children. It was thus clear to the court that due to the plaintiff's mental condition the plaintiff was incapable of making decision and acting on his own and was thus accordingly accompanied by his family members in the execution of the sale of his rubber estate.

I

[54] Therefore, given the circumstances preceding and surrounding the transfer the court considered and viewed with suspicion the plaintiff's transfer of his interest to his brother and nephews instead of his family. The transfer had been effected in the absence of plaintiff's rightful beneficiaries, and the plaintiff's family to the exclusive benefit of the defendants. In the light of the suspicious circumstances surrounding the transfer the court questioned the defendants' motive in executing the transfer on the plaintiff whom the defendants knew was mentally disable. As an elder brother, the 1st defendant was undoubtedly in a position to dominate authority and possibly assert undue influence over a mentally sick younger sibling into the disputed transfer. It was clear that the plaintiff who had been suffering from the most severe of mental condition had been surreptitiously led into the 1st defendants' solicitor's office to execute elaborate legal documentation before a solicitor who by DW2's own admission had no prior knowledge of the plaintiff's mental condition.

[55] The court further found the circumstances subsequent to the plaintiff's transfer equally suspicious as the transfer was only discovered by the plaintiff's wife and children through a third party, PW4. In this regard, there was no justifiable explanation for the defendants not to inform the plaintiff's wife and children of the transfer particularly as the 1st defendant had previously visited PW5 at her residence. The plaintiff was regularly visited by his family and there was thus no valid reason for the plaintiff's family not to be informed or consulted by the defendants of the transfer.

[56] As the plaintiff's wife and children were clear beneficiaries and in view of the family's poverty any dealing involving their rightful inheritance would be of serious and grave concern to the family. Given the parties' consanguineous relationship, the defendants were obligated to notify the plaintiff's family as the plaintiff's transfer would adversely result in a significant dilution of the plaintiff's interest in the properties. It was thus clear to the court that the defendants had deliberately and willfully excluded the plaintiff's family from any knowledge of the transfer with the sole and clear intent to defraud the plaintiff into executing the transfer to the defendants' exclusive benefit. The court thus concluded that the defendant's willful non disclosure to the plaintiff's family was in bad faith and tampered with fraudulent intent.

[57] In the light of the plaintiff's long history of chronic mental illness and the peculiar circumstances preceding, surrounding and consequent to the plaintiff's transfer and in the absence of the 1st defendant's evidence to challenge plaintiff's clear assertion the court thus concluded that the defendants had defrauded the plaintiff into transferring the plaintiff's interests in the land to the defendants.

Legal Standing Of The Plaintiff To Institute Court Action By Next Friend, The Plaintiff's Wife

[58] The defendants had disputed the competency of the plaintiff's suit on the ground that the plaintiff's wife and plaintiff's solicitors had acted without *locus*. The defendants further contended that the plaintiff was first required to be determined as a mentally disordered person under the Ordinance. At the time the plaintiff's suit was filed in 2003 the plaintiff have not been found by due cause of law to be a mentally disordered person. The defendants therefore submitted that in the absence of such order the plaintiff's wife was precluded from acting on the plaintiff's behalf and the plaintiff's suit should be dismissed.

[59] It is however clear to the court that the Ordinance did not contain any provision which require the plaintiff to be determined as a mentally disordered person prior to the institution of the plaintiff's suit by his next friend. It was also clear from the provisions of the Ordinance that there was no requirement for the plaintiff to be determined a mentally disordered person before reliance on the exception provided under O. 76 r. 3(2) of the Rules as was submitted by the defendant. Order 76 r. 1 defined a person under disability as a person who is an infant or a patient, where a patient is defined to mean mentally disordered person within the meaning of the Ordinance. Section 2 in the definition section of the Ordinance, defined a mentally disordered person as follows:

> "mentally disordered person" in Part 1 of this Ordinance means any person found by due course of law to be of unsound mind and incapable of managing himself or his affairs and in parts 11 and 111 of this Ordinance means any person of unsound mind and any person being an idiot;

[60] Part 1 of the Ordinance provides for provisions regulating proceedings in enquiries into mental disorders. Part 11 and 111 of the Ordinance deals with the reception and detention of mentally disordered persons in mental hospitals by the minister.

[61] Section 3 of the Ordinance provides: A

(a) The court may, on such application as is hereinafter mentioned, make an order directing an enquiry whether any person subject to the jurisdiction of the court who is alleged to be mentally disordered is or is not of unsound mind and B incapable of managing himself and his affairs;

(b) Such order may also contain directions for the enquiries concerning the nature of property belonging to the person.

[62] Section 10 of the Ordinance provides for the appointment of C a committee or committees to manage the estate or affairs of a mentally disordered person where the court may order for the remuneration of such committee from the person's estate. Section 11 further provides that the committee or the estate of the mentally disordered person be conferred all such powers proper D and necessary for the management of the estate of a mentally disordered person.

[63] It was clear that the Ordinance merely provided for provisions to regulate proceedings in enquiries into mental E disorders, reception and detention of persons of unsound mind in mental hospitals. There was therefore no provision in the Ordinance that required the plaintiff to be first determined a mentally disordered person prior to the commencement of court action by plaintiff's next friend. F

[64] Pursuant to O. 76 r. 2(1) of the Rules, a person under disability cannot bring any proceeding except by his next friend or guardian *ad litem*. Order 76 r. 3(2) of the Rules however provides an exception to the general rule and allows the institution of G a court suit by a person under disability through his next friend acting on his behalf. Order 76 rr. (2) and (3) of the Rules provide:

O 76 r. 2(1) provides: H

> 2.(1) A person under disability may not bring, or make a claim in, any proceedings except by his next friend and may not defend, make a counter claim or intervene in any proceeding, or appear in any proceedings under a judgement or order notice of which has been served on him, except I by his guardian *ad litem*.

A O. 76 r. 3(2) provides:

> (2) Except as provided by paragraph (4) or (5) or by rule 6, an order appointing a person as next friend or guardian ad litem of a person under disability is not necessary.

B **[65]** Based on the clear exception provided in O. 76 r. 3(2) of the Rules, it was thus clear that there was no requirement for a court order before the plaintiff's wife be allowed to act on the plaintiff's behalf as his next friend. There is also no provision in the Ordinance requiring the plaintiff as a person under disability, C be first determined as a mentally disordered person prior to the commencement of the plaintiff's suit by plaintiff's wife. Accordingly, the defendant's objection to the competency of plaintiff's suit was clearly misconceived and without merit.

D **[66]** In this regard, the court noted that the plaintiff's solicitor as a matter of caution had undertaken to file the required documents stated in O. 76 r. 3(7) of the Rules, namely the filing of a written consent of the plaintiff's wife to be the plaintiff's next friend set out in Form 189 and the plaintiff's solicitor's certificate certifying E to the matters mentioned in O. 76 r. 3(7)(c) in Form 190 of the Rules.

[67] The defendants were further found to have raised similar objection on the issue of competency of the plaintiff's suit in the F defendants' interlocutory application to strike out the plaintiff's claim which had been dismissed by the High Court. The learned judge, TS Nathan J in his judgement dated 25 June 2009 held that O. 76 r. 3(2) of the Rules provided an exception to the general rule that requires an order be first made before a person G under disability be allowed to act through his next friend. Further, the defendants' objection on the competency of the plaintiff's suit had been clearly addressed and considered in the learned judge's ground of judgment where he stated:

> H (e) Against the above factual background, the Defendants were precluded from raising the issue of capacity of the plaintiff to act through his next friend so late in the day, especially when such issue was not their pleaded defence.

[68] The judge held that as the issue was not in the defendants' I pleaded defence and was raised at an advanced stage of the case management the defendants were precluded from raising the issue.

The defendants' appeal against the dismissal of the defendants' application to strike out the plaintiff's suit further been dismissed by the Court of Appeal. The Court of Appeal held that the plaintiff's suit could not be struck off without hearing the evidence of witnesses to determine the mental status of the plaintiff. Thus, based on the orders of the High Court and Court of Appeal respectively dated 25 June 2009 and 31 March 2011 the defendants' objection on the issue of competency of the plaintiff's suit was found to be clearly *res judicat*a as both courts have clearly considered and decided on the issues raised by the defendants.

Conclusion

[69] In the light of abundant evidence adduced before the court and on a balance of probabilities, the court thus held that the plaintiff was of unsound mind when he executed the transfer and that the defendants' had defrauded the plaintiff in the execution of the transfer which accordingly rendered the plaintiff's transfer ineffective in law, null and void. Accordingly, the plaintiff's claim for the reliefs prayed in para. 9 of the plaintiff's statement of claim dated 22 April 2003 was allowed with interests and costs.